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No. 75-1772

In the Supreme Court of the United States

OCTOBER TERM, 1976

AGNEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 533 F. 2d 1387.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1976. A petition for rehearing was denied on May 7, 1976 (Pet. App. 17a-20a). The petition for a writ of certiorari was filed on June 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof that a firearm has previously traveled in interstate commerce may establish the offense of possession of a firearm "in commerce or affecting commerce" under 18 U.S.C. App. 1202(a).

2. Whether the manufacturer's name and the serial number on a firearm in petitioner's possession were obtained in violation of the Fourth Amendment.

3. Whether petitioner was erroneously denied bail pending appeal during the time he was being held, pursuant to a temporary sentence under 18 U.S.C. 4208 (b), for a medical examination to determine whether he was physically capable of withstanding incarceration.

STATUTE INVOLVED

18 U.S.C. App. 1202(a)(1) provides, in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * *

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of three counts of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a)(1). On the representation of petitioner's counsel that petitioner was, for medical reasons, not physically capable of withstanding incarceration, the court sentenced petitioner initially under 18 U.S.C. 4208(b) so that he could be examined in order to determine whether his physical condition was as serious as

alleged. Following the study, petitioner was sentenced to concurrent terms of two years' imprisonment, but the sentences were suspended and petitioner was placed on probation for five years. He also was fined $10,000 on each of the three counts, but the fines on two of the counts were suspended. The court of appeals affirmed petitioner's conviction on the first count, but reversed on the remaining counts on the ground that all counts related to the continuous possession of a single weapon, which constituted a single offense (Pet. App. 1a-16a; 533 F. 2d 1387).

The evidence at trial and at the pre-trial suppression hearings showed that Buford Slone sold a .32 caliber revolver to petitioner in October 1970 (Tr. 13-17).[1] On March 28, 1973, petitioner was stopped by two Kentucky State Police patrolmen who were conducting a routine traffic check in Floyd County, Kentucky (Tr. 29-30; 1 H. Tr. 13). As petitioner produced his operator's license, one of the officers observed a revolver lying on the seat beside petitioner (Tr. 31; 1 H. Tr. 13). In response to the officer's inquiry petitioner stated that the gun was his and that he had not been convicted of a felony (Tr. 32; 1 H. Tr. 13). The officer asked to see the weapon, and petitioner handed it to him (Tr. 31; 1 H. Tr. 15, 18-19). The officer noted that the gun, which was loaded, was a Burgo .32 caliber revolver. He recorded the serial number and returned the gun to petitioner (Tr. 31-32; 1 H. Tr. 18-21). The officer, who knew petitioner and believed that he had, in fact, previously been convicted of a felony (1 H. Tr. 22),

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[1] "Tr." refers to the transcript of the trial. "1 H. Tr." refers to the transcript of the suppression hearing held on July 17, 1974. "2 H. Tr." refers to the transcript of the suppression hearing held on January 31, 1975. "S. Tr." refers to the transcript of the sentencing proceedings.

then contacted a local law enforcement office. The office had no record of a felony conviction, however, and petitioner was allowed to leave (1 H. Tr. 19, 22).

On December 21, 1973, Special Agent Dale Beam of the Bureau of Alcohol, Tobacco, and Firearms, along with other officers, entered petitioner's store in Lackey, Kentucky, to execute a search warrant for non-tax-paid liquor (Tr. 48-49; 2 H. Tr. 14-15).[2] Knowing that petitioner had previously carried a pistol, Beam frisked petitioner and asked if he was wearing a gun (Tr. 46-47, 49-50; 2 H. Tr. 16-17). Petitioner stated that the only gun in the store was on a nearby shelf (Tr. 49-50). He picked up the weapon and handed it to Beam, who recorded the make and serial number (Tr. 50; 2 H. Tr. 17). It was the same gun that petitioner possessed when he was stopped in March 1973. Petitioner stated that he had purchased the revolver from Buford Slone (Tr. 57).

The gun possessed by petitioner was manufactured in West Germany in 1968 (Tr. 87-88). It was stipulated at trial that petitioner had been convicted of a felony in 1953 (Tr. 6).

DISCUSSION

1. Petitioner contends (Pet. 17-20) that the court of appeals erred in construing 18 U.S.C. App. 1202(a) to prohibit convicted felons from possessing firearms that previously traveled in interstate commerce but were not so moving at the time of the charged possession.

The weapon that petitioner possessed was manufactured in West Germany in 1968 (Tr. 88). The firearm was purchased in Kentucky for Buford Slone by his wife

[2]The warrant authorized a search for liquor being sold without a federal tax stamp (2 H. Tr. 17).

in November 1969 (Tr. 8). Petitioner, a convicted felon, possessed the gun subsequent to his purchase of it from Slone in October 1970 (Tr. 6, 14, 17).

This question concerning the proper construction of Section 1202(a) is identical to that presented to this Court in the petition for a writ of certiorari in *Scarborough* v. *United States*, No. 75-1344, which the Court granted on October 4, 1976, with respect to that question.[3] We accordingly submit that it would be appropriate to hold this petition pending the Court's resolution of the issue in *Scarborough*.[4]

2. There is no reason to review petitioner's other claims.

[3]This issue is also presented in *Carter and Hall* v. *United States*, No. 75-1882, in which we have suggested deferring disposition of the petition pending disposition of *Scarborough*.

[4]Petitioner also challenges the failure of the district court to give a requested instruction to the jury regarding the interstate nexus required by the statute (Pet. 20-22), but this presents no issue separately warranting review by this Court. In the first place, neither the text of the requested instruction nor the instruction actually given is in the record on appeal in the court of appeals (although the former is set out at Pet. 20). This lack in the record on appeal forecloses review of the correctness of the jury instructions. It appears, in any event, that the Court need not address this question to dispose of the case. Apparently (see Pet. 21), petitioner challenges the instruction on the same ground that petitioner advanced in support of his motion at the close of the government's case to dismiss the indictment (Tr. 96-103) and that was rejected in that context by both courts below, *i.e.*, that he may not be found guilty of possessing a firearm under 18 U.S.C. App. 1202(a)(1) on the basis of the movement of the firearm from West Germany, where it was manufactured, to Kentucky, where petitioner was found to be in possession. The rejection of that argument in the context of petitioner's motion to dismiss raises the question which, we have suggested, should be disposed of in accordance with *Scarborough*. That disposition will control petitioner's case.

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a. Petitioner contends (Pet. 13-15) that the manufacturer's name and the serial number on the gun were obtained as a result of illegal seizures on March 28, 1973, when petitioner was stopped at the routine traffic check, and on December 21, 1973, in connection with the execution of a search warrant. As the district court found (1 H. Tr. 29-30), the officer conducting the traffic check in March 1973, observed the revolver in plain view from a place where he was entitled to be. The officer knew petitioner and believed him to be a convicted felon. When the officer asked to see the gun, petitioner handed it to him voluntarily and the agent noted the manufacturer's name and the weapon's serial number (Tr. 31; 1 H. Tr. 15, 18-29). The brief and nonintrusive examination of the gun in these circumstances was plainly reasonable. Because the manufacturer's name and the serial number were lawfully obtained in March 1973, there is no reason to consider whether the same evidence obtained in the December 1973 search was obtained illegally. But, in any event, the courts below correctly held (Pet. App. 18a-19a) that the December 1973 search was valid.[5]

b. Finally, petitioner contends (Pet. 22-26) that the court should have granted him bail pending appeal. This motion was made made during the time petitioner was being held at a hospital, pursuant to a temporary sentence under 18 U.S.C. 4208(b), for a medical examination to determine the correctness of his counsel's statement that petitioner was not physically capable of withstanding incarceration. The motion was denied by the district court on May 27, 1975. A similar motion to the court of appeals was denied by that court on June 12, 1975. Petitioner did not renew his motion in

[5]Contrary to petitioner's suggestion (Pet. 14-15), the gun was obtained before the search for untaxed liquors was conducted.

this Court. The question has now become moot. After the completion of the medical examination, petitioner received a suspended sentence and a five-year probation term, and he was fined $10,000. The final sentence did not call for a period of incarceration, and thus there is no need for bail pending appeal.[6]

CONCLUSION

Insofar as it presents the issue regarding the proof necessary to show the interstate nexus required for a possession offense under 18 U.S.C. App. 1202(a), the petition should be held pending this Court's decision in *Scarborough* v. *United States*, No. 75-1344. In all other respects the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]On July 17, 1975, a bond pending appeal was fixed by the district court in the sum of $5,000.

DOJ-1976-10